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**UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA**

SANDRA KIRKMAN, CARLOS
ALANIZ, individually and successors-in-
interest to JOHN ALANIZ, deceased,

Plaintiffs,

vs.

STATE OF CALIFORNIA, RAMON
SILVA, and DOES 1-10, inclusive,

Defendants.

Case No. 2:23-cv-07532-DMG-SSC

Assigned to:

Hon. Dolly M. Gee

Hon. Magistrate Stephanie S.

Christensen

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' EX PARTE
APPLICATION FOR
MODIFICATION OF
SCHEDULING ORDER AND
TRIAL CONTINUANCE**

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION

I. INTRODUCTION

This Court should deny Defendants' instant application for modification of the scheduling order and trial continuance for four reasons. First, Defendants misuse the ex parte application procedure because they cannot show that this is an emergency not of their own making, that this could not have previously been brought as a regularly noticed motion, and that good cause exists to modify the scheduling order for speculative discovery requests. Second, Defendants will not be prejudiced if this application is denied: the primary issue in this case is the Defendant Officer's use of deadly force against Decedent; it is not about Decedent's mental health history in the years before the date of the incident and to delay the entire case for additional discovery on such tangential matters (which will be subject to motions *in limine*) is inefficient and inappropriate. Third, Plaintiffs' counsel's trial calendar is full. Fourth, Plaintiffs have been waiting over two years for their day in court, and it is not in the interest of justice to further delay Plaintiffs' trial. As the Court states in its Initial Standing Order (Dkt. No. 8), it is important that this Court's schedule, docket, and trial schedule are understood as firm. This ensures that the Court and all parties are able to litigate the case accordingly. The parties have more than sufficient evidence to proceed to trial, including because the incident was captured on video, and it would not be in the interest of judicial economy to prolong unnecessary discovery and incur additional time and discovery expenses.

Defendants have filed an *Ex Parte* application seeking an order to modify the Scheduling Order by at least ninety (90) days for additional fact discovery related to the production of Decedent's mental health and medical records beginning eight years prior to the incident. Plaintiffs oppose Defendants' *Ex Parte* application and

1 respectfully request that this Court deny Defendants' *Ex Parte* application in its
2 entirety for the reasons that follow.

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4 **II. RELEVANT PROCEDURAL HISTORY**

5 On July 28, 2023, Plaintiffs filed their lawsuit arising out of this incident,
6 naming the State of California, Ramon Silva, and DOES 1-10 as defendants. (Dkt.
7 No. 1-1). On September 11, 2023, Defendants filed their notice of removal to
8 federal court. (Dkt. No. 1). Defendants have moved to delay or otherwise prolong
9 this action at several previous junctures. For a third time, Defendants are seeking to
10 delay the case by extending fact discovery cutoff deadline to conduct additional
11 discovery flowing from the information contained in Decedent's mental health
12 records, which have no bearing on the liability or damages issues in this case.
13 Defendants also anticipate filing a motion to withdraw, on purported conflicts that
14 have just arisen, which may also unreasonably delay this action. Defendants provide
15 no information regarding the nature of the conflict, nor whether it is impugned to the
16 entire Attorney General's Office, requiring outside counsel to be retained.

17 Extending the Fact Discovery cutoff and the trial date by at least 90 days, to
18 continue a fishing expedition into decedent's mental health history is a waste of the
19 Parties' and this Court's time and resources. Defendants have the records and the
20 information contained therein they requested through their subpoena. Additional
21 discovery is unnecessary. It is prejudicial to Plaintiffs, who already will be waiting
22 nearly three years after their son's death to have their day in court, especially when
23 the incident was caught on video and the witness statements are available to both
24 parties. It is also a poor use of judicial time and resources, when the parties already
25 have a trial date and have been working to complete discovery deadlines. Therefore,
26 by way of their ex-parte application, Defendants again request another delay in the
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1 litigation of Plaintiffs' claims for speculative, vague, and peripheral discovery
2 reasons, which they could have addressed earlier.

3 Furthermore, Judge Christiansen specifically set a production deadline for the
4 records that would comply with the current fact discovery cutoff set in this Court's
5 scheduling order. Plaintiffs complied with that deadline and produced the records in
6 full, pursuant to the protective order in effect in this case.

7 **III. LEGAL STANDARD**

8 A proper ex parte motion contains two distinct parts: "[t]he first part should
9 address only why the regular noticed motion procedures must be bypassed [and t]he
10 second part consists of papers identical to those that would be filed to initiate a
11 regular noticed motion." *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F.
12 Supp. 488, 492 (C.D. Cal. 1995). The granting of *ex parte* relief requires an
13 evidentiary showing of good cause that: (1) "the moving party's cause will be
14 irreparably prejudiced if the underlying motion is heard according to regular noticed
15 motion procedures"; and (2) "the moving party is without fault in creating the crisis
16 that requires ex parte relief, or that the crisis occurred as a result of excusable
17 neglect." *Mission Power*, 883 F. Supp. at 492; *see, e.g., Azam v. Brown*, 714 F.
18 App'x 663, 665 (9th Cir. 2017) (recognizing *Mission Power* as setting forth standard
19 for *ex parte* relief); *Erichsen v. Cnty. of Orange*, 677 F. App'x 379, 380 (9th Cir.
20 2017) (mem.) (noting that appellants failed to meet threshold requirement for *ex*
21 *parte* relief by failing to establish that they were "without fault in creating the crisis
22 that requires ex parte relief" (quoting *Mission Power*, 883 F. Supp. at 492)).

23 Under Rule 16, a scheduling order "may be modified only for good cause and
24 with the judge's consent." Fed. R. Civ. P. 16(b)(4). A party seeking to modify the
25 schedule must show good cause and diligence in meeting Federal Rule of Civil
26 Procedure 16's requirements. *See* Fed. R. Civ. P. 16 advisory committee notes (1983
27 amendment); *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992)
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1 (Rule 16(b)’s “good cause” standard focuses on the diligence of the party seeking
2 modification of the scheduling order). “A party demonstrates good cause for the
3 modification of a scheduling order by showing that, even with the exercise of due
4 diligence, he or she was unable to meet the timetable set forth in the order. *Matrix*
5 *Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 671 (C.D. Cal.
6 2003) (citing *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th
7 Cir. 2002)); *Johnson*, 975 F.2d at 609. “Moreover, carelessness is not compatible
8 with a finding of diligence and offers no reason for a grant of relief.” *Johnson*, 875
9 F.2d at 609. “[T]he existence or degree of prejudice to the party opposing the
10 modification might supply additional reasons to deny a motion” to modify a
11 scheduling order. *Id.* However, “[i]f the party seeking the modification ‘was not
12 diligent, the inquiry should end’ and the motion to modify should not be granted.”
13 *Zivkovic*, 302 F.3d at 1087 (citation omitted); *see also Johnson*, 975 F.2d at 609.

14 **1. Defendants Do Not Establish that Good Cause Exists to Modify the**
15 **Court’s Scheduling Order.**

16 In support of their Ex Parte Application, Defendants argue that they have been
17 diligent in seeking this discovery and that they are in this position because Plaintiffs
18 withheld these records. However, while Defendants did propound multiple sets of
19 written discovery to Plaintiffs, to which Plaintiffs provided substantive and timely
20 responses early in the fact discovery stage of the case, Defendants only deposed
21 Plaintiffs on June 19, 2024, despite this Court issuing its scheduling order on
22 January 30, 2024. (Dkt. No. 24, Declaration of Shannon J. Leap “Leap Decl.” at ¶ 6).
23 Plaintiffs noticed the depositions of Defendant Ramon Silva and Officer Van Dragt
24 on January 30, 2024 for a date in February, 2024 which was ultimately continued by
25 mutual agreement of the parties to March 6, 2024 and April 4, 2024, respectively.
26 (Leap Decl. at ¶ 2). In their depositions, Plaintiffs provided testimony regarding
27 Decedent, his specific mental health diagnoses, and their relationship with Decedent
28 – including in the context of their relationship with Decedent in the context of his

1 mental health. Defendants therefore have had information about Decedent's mental
2 health as it pertains to Plaintiffs' claims for damages for months, and from the outset
3 of this litigation, by way of Plaintiffs' complaint. (Leap Decl. at ¶ 6); *See In re W.*
4 *States*, 715 F.3d at 737 (9th Cir. 2013) ("The good cause standard typically will not
5 be met where the party seeking to modify the scheduling order has been aware of
6 the facts and theories supporting amendment since the inception of the action.").

7 Plaintiffs and plaintiffs' counsel have been cooperative and acted in good
8 faith through the duration of this litigation, including the specific disputes regarding
9 the production of these records, which Plaintiffs maintained and continue to
10 maintain are privileged. (Leap Decl. at ¶ 3). This has included engaging in several
11 meet and confer efforts, wherein Plaintiffs' counsel offered to produce the records
12 with redactions pursuant to stated privileges and a privilege log in September 2024,
13 an offer which Defendants rejected. *Id.* Plaintiffs' counsel also offered to amend the
14 complaint to remove allegations of mental health issues and state Plaintiffs' claims
15 for damages more specifically, another offer which Defendants rejected. *Id.* at ¶ 4.
16 Plaintiffs have no intention of relying on these records at trial. Plaintiffs attempted
17 to compromise, while maintaining the contended privileges and protecting
18 Plaintiffs' interests. In addition, Defendants note that they have produced over 9,000
19 documents in this case, in response to Plaintiffs' requests for production of
20 documents and as supplemental disclosures. About 4,500 of those were produced on
21 November 20, 2024. *Id.* at ¶ 5. However, Plaintiffs are not seeking to extend the fact
22 discovery cutoff.

23 **2. Defendants Will Not Suffer Any Prejudice If Their Ex Parte Application**
24 **Is Denied.**

25 Good cause also does not exist because Defendants will not suffer any
26 prejudice from a denial of their request to modify the Scheduling Order. Defendants
27 have deposed both Plaintiffs, the Decedent's grandparents (who are not parties to
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1 this action nor witnesses to the incident), and two percipient third party witnesses
2 identified in the production of documents from the DOJ. Plaintiffs have deposed
3 Defendant Silva and Officer Van Dragt. As noted in Plaintiffs' opposition to
4 Defendants' previous ex parte application to extend the fact discovery cutoff, there
5 is ample evidence with which the parties can proceed to trial, including the
6 testimony from these depositions, the body worn camera and dash camera video
7 footage of the incident, scene photos, witness statements, and other records from the
8 investigation of this incident, involving an unarmed decedent.

9 Defendants contend that the continued investigation of, proposed additional
10 written discovery, and potential depositions of individuals identified in the mental
11 health records warrants an extension of the fact discovery cutoff. However, this
12 information is not relevant to the questions of liability or damages in this case, and
13 is therefore not reasonably calculated to lead to admissible evidence, as Rule 26
14 requires. Therefore, deadlines in place in this case should not be extended on
15 speculative and unnecessary discovery on tangential issues, designed to distract
16 from Defendant's unreasonable and excessive use of force against Decedent.

17 *a. The Records are Irrelevant as to Liability*

18 Defendants argue that further discovery regarding Decedent's mental health
19 records should be warranted because this information is relevant to liability insofar
20 as it could indicate "whether [Decedent] exhibited aggressive tendencies during any
21 prior mental health episodes needs to be explored." (Def. App. at 8). Not only is it
22 wholly speculative that additional discovery will yield such information, it is also
23 unsupported by the evidence in the record, and it is plainly improper character
24 evidence. Information regarding whether Decedent exhibited aggressive tendencies
25 in the past is improper propensity character evidence under Federal Rule of
26 Evidence 404. This argument fails and Defendants do not articulate any other
27 reason why or how Decedent's mental health history bears on *Defendant Silva's*
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1 actions and inactions on the date of the incident. This information was also unknown
2 to Defendant Silva at the time of his use of force. Decedent's actions that
3 precipitated the law enforcement encounter are irrelevant to evaluating Plaintiffs'
4 claims because Defendant Officer Silva did not have that information at the time he
5 used lethal force against Decedent. As the Court noted in its order denying
6 Defendants' previous Ex Parte Application (Dkt. No. 39 at 4), the Fourth
7 Amendment reasonableness standard in police shooting-death cases, requires the
8 fact finder to confine their inquiry to the information known to the officer at the
9 time of the use of force. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). "The
10 clarity of hindsight cannot provide the standard for judging the reasonableness of
11 police decisions made in uncertain and often dangerous circumstances." *Tennessee*
12 *v. Garner*, 471 U.S. 1, 26 (1985).

13 In *Glenn v. Washington County*, 673 F.3d 864, 873 (9th Cir. 2011), the Ninth
14 Circuit reiterated that information unknown to an officer at the time of his use of
15 force – or information *acquired after the incident* by investigators or during
16 discovery – cannot be considered. The Ninth Circuit stated that "[w]e cannot
17 consider evidence of which the officers were unaware—the prohibition against
18 evaluating officers' actions 'with the 20/20 vision of hindsight' cuts both ways." *Id.*
19 (citing *Graham*, 490 U.S. at 396). This prohibition also applies when evaluating
20 California state law battery and negligence claims arising out of the same conduct
21 and use of force. *See Munoz v. City of Union City*, 120 Cal. App. 4th 1077 (2004);
22 *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1232-33 (9th Cir. 2013) (applying
23 California negligence law); *Tabares v. City of Huntington Beach*, 988 F.3d 1119,
24 1125 (9th Cir. 2021).

25 Furthermore, to the extent that Defendants argue these records are relevant to
26 Decedent's behavior on the date of the incident, this is also an improper inquiry for
27 the same reasons. *See Valtierra v. City of Los Angeles*, 99 F. Supp. 3d 1190, 1193
28 (C.D. Cal. 2015) (holding that information bearing on the Decedent's state of mind

1 on the date of the incident, but unknown to the officer was inadmissible because that
2 information was not known to the shooting officer at the time of the incident). Just
3 as in *Valtierra*, Defendant Silva had no information regarding Mr. Alaniz's state of
4 mind at the time of Silva's use of deadly force, and such information therefore is not
5 relevant to the inquiry.

6 Defendants have not explained how numerous and speculative depositions,
7 subpoenas, additional and what may be cumulative written discovery are necessary
8 for Defendants' preparation at trial or for their expert witnesses to complete their
9 reports. *See Arredondo v. University of La Verne*, Case No. 2:20-cv-07665-MCS-
10 RAO, 2022 WL 423389, at *1 (C.D. Cal. Jan. 11, 2022) (denying ex parte
11 application to extend expert discovery deadlines because the moving party failed to
12 make a showing that the pending discovery "is information for which expert
13 testimony will be necessary and on which the expert's conclusions will rely.")).
14 Moreover, initial expert designations are scheduled for December 3, 2024, and
15 expert discovery does not close until February 4, 2024. Defendants' experts have
16 sufficient time to review the records with the currently set deadlines.

17 *b. The Records Are Not Relevant for the Purposes of Damages.*

18 Defendants argue that additional discovery regarding Decedent's mental health is
19 necessary because of Plaintiffs' claims for damages. Plaintiffs do not assert any
20 claim for damages for Decedent's own emotional distress, so the records are
21 irrelevant as to Decedent's emotional distress as a result of being shot. Plaintiffs
22 seek survival damages for Decedent's pre-death pain and suffering, and can specify
23 that this is in regards to Decedents' pre-death *physical* pain and suffering – not his
24 emotional pain and suffering.

25 Plaintiffs also are not seeking damages for financial support Decedent provided
26 to Plaintiffs. This information was already provided to Defendants by way of
27 Plaintiffs' deposition testimony and responses to written discovery. It is undisputed
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1 that Decedent was not working at the time of his death, and it is unclear how
2 additional discovery of Decedent's mental health history would produce information
3 regarding his financial support of his parents, Plaintiffs.

4 Defendants also argue that additional discovery into Decedent's mental health
5 history is relevant to the nature and quality of Plaintiffs' relationship with their son.
6 Again, plaintiffs have already sat for depositions and provided ample testimony
7 regarding the nature and quality of their relationship with their son, as have
8 Decedent's grandparents.

9 **3. Lead Trial Counsel Dale K. Galipo Has A Full Trial Schedule.**

10 Defendants do not specify the amount of time by which they seek to continue
11 to the current trial date. However, if it is consistent with their request to continue the
12 fact discovery cutoff by 90 days, this would continue the trial date to June or July
13 2025. Mr. Galipo also has a full trial schedule for the intermittent months between
14 April and August 2025. It is not in the interests of justice to delay trial an additional
15 four or five months, when lead trial counsel is not available at that time, and when
16 Plaintiffs will have already waited three years from the death of their son to have
17 their day in court.

18 **IV. THE COURT SHOULD LIMIT DISCOVERY SHOULD IT FIND**
19 **GOOD CAUSE TO GRANT DEFENDANTS' EX PARTE APPLICATION**

20 In the event that the Court finds good cause to grant Defendants' Application
21 to modify the Scheduling Order, the Court should maintain the current trial date of
22 April 15, 2025 and extend the fact discovery cutoff dates and other deadlines by 30
23 days only. Lead Trial Counsel, Mr. Galipo's trial calendar is fully booked through
24 July 2025, and he would be unavailable for a trial at the time to which Defendants
25 propose to continue the trial date.

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2 **V. CONCLUSION**

3 For the foregoing reasons, Plaintiff respectfully requests that the Court deny
4 Defendants' Ex Parte Application to Modify Scheduling Order in its entirety.

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6 Respectfully submitted,

7 DATED: November 21, 2024

LAW OFFICES OF DALE K. GALIPO

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By /s/ Shannon J. Leap

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Dale K. Galipo
Shannon J. Leap
Attorneys for Plaintiffs

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